

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Alex Wellerstein)
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Filing Date: November 5, 2015)
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Case No. FIC-15-0005

Issued: April 4, 2016

Decision and Order

On November 5, 2015, Alex Wellerstein filed an Appeal from a determination issued to him by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (Request No. FOIA 13-00049-K). In that determination, NNSA responded to a request for information that Dr. Wellerstein filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA released six documents that it determined to be responsive to the request, withholding significant portions of each pursuant to Exemptions 3 and 6 of the FOIA. This Appeal pertains only to the withholdings taken under Exemption 3.

I. Background

On November 12, 2012, NNSA received a FOIA request from Dr. Wellerstein seeking copies of records contained in the Lawrence Livermore National Laboratory (LLNL) and Los Alamos National Laboratory (LANL) archives pertaining to the LLNL projects GNOMON and SUNDIAL and the LANL project TAV, dating from the mid-1950s. In its October 15, 2015, determination letter, NNSA informed Dr. Wellerstein that LANL and its DOE oversight office had located no documents responsive to his request, and that LLNL and its DOE oversight office had identified six responsive documents. NNSA then provided the six responsive documents to Dr. Wellerstein with portions of each document deleted. A significant portion of each document was withheld as classified material protected from disclosure by the Atomic Energy Act of 1954. In addition, the names of authors and recipients of the documents were withheld pursuant to Exemption 6 of the FOIA, which permits the government to withhold information that could invade a person's privacy.

In his appeal, Dr. Wellerstein challenges NNSA's use of Exemptions 3 and 6 to withhold information from the copies of the responsive documents it provided to him. We issued a decision regarding the information withheld from the documents pursuant to Exemption 6, considering as well the adequacy of NNSA's search for documents responsive to Dr.

Wellerstein's request, on December 10, 2015 (Case No. FIA-15-0064). In his Appeal, Dr. Wellerstein contends that the information withheld pursuant to Exemption 3 should be reviewed for possible disclosure because he finds it "incredibly unlikely that literally every word" in the responsive documents is still "Restricted Data under current classification requirements." He requests that "the maximum amount of information allowed under the classification guidelines be released." Appeal at 1. Because, as explained below, the information withheld under Exemption 3 was asserted to be classified information, we referred the portion of the Appeal that challenged those withholdings to the Office of Environment, Health, Safety and Security (EHSS), which reviewed the Exemption 3 withholdings to determine whether they were properly classified under current guidance. We have now received EHSS's report.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). To the extent permitted by law, the DOE will release documents exempt from mandatory disclosure under the FOIA whenever it determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Exemption 3 of the FOIA exempts from disclosure information "specifically exempted from disclosure by statute . . . if that statute – (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . ." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., Greg Marlowe*, Case No. FIC-13-0001 (2013).

The Associate Under Secretary for Environment, Health, Safety and Security is the official who makes the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Order 475.2B §§ 5(b)(7) (Restricted Data and Formerly Restricted Data per the Atomic Energy Act). Upon referral of this appeal from the Office of Hearings and Appeals, the Associate Under Secretary reviewed the information withheld pursuant to Exemption 3 from the six documents that NNSA identified as responsive to Dr. Wellerstein's request.

The Associate Under Secretary reported the results of his review in a memorandum dated March 23, 2016. In that review, he explained that the information previously withheld under

Exemption 3 relates to nuclear weapons design. He determined that, based on current DOE classification guidance, that information is still properly classified as Secret Restricted Data pursuant to the Atomic Energy Act. The denying official for these withholdings is Matthew B. Moury, Associate Under Secretary for Environment, Health, Safety and Security, Department of Energy.

Based on the Associate Under Secretary's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding those portions of the six documents that NNSA identified as responsive to Dr. Wellerstein's request and withheld pursuant to Exemption 3 of the FOIA. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of this exemption, the disclosure is prohibited by statute. Therefore, the previously withheld portions of the six responsive documents must continue to be withheld from disclosure. Accordingly, Dr. Wellerstein's Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Alex Wellerstein on November 5, 2015, Case No. FIC-15-0005, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the right to pursue litigation. FOIA requesters may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov

E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 4, 2016